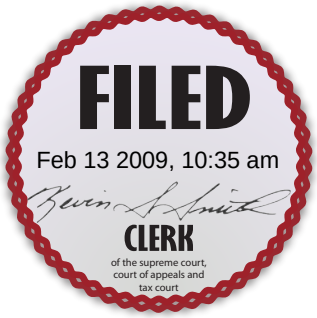


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| NICHOLAS MATHES, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0802-CR-84 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Judge
Cause No. 49G02-0707-FC-140120

**February 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Nicholas Mathes appeals his conviction for Class C felony burglary. We reverse.

## Issue

The sole issue we need to address is whether there is sufficient evidence to support Mathes's conviction.

## Facts

On the night of March 15, 2007, the alarm system at the warehouse of Now Records in Indianapolis was triggered. The business owners, Leonard and Scott Nahmias, went to investigate and noticed that a janitor's closet inside the warehouse had been forcibly opened. The Nahmiases then had their alarm company call the police. Upon arriving, the officers discovered that the window on the back door of the warehouse had been broken. Additionally, one window on each of three vehicles parked in the parking lot, which was surrounded by a fence, had been broken out. One of these vehicles, a Honda Accord, had had its steering column "punched," indicating that someone had attempted to hotwire it. Tr. p. 114. The Accord had been parked in the Now Records parking lot for three to four days. Now Records leased some of its parking spaces, and the Accord's owner was a truck driver who had left her car there while on the road.

A police canine found Mathes hiding inside the Now Records warehouse. Outside, police also apprehended Kenneth Rackemann. Initially, the Nahmiases reported that nothing was missing from their building. However, a few days after the break-in

they discovered that a cell phone was missing. The phone then was found among Rackemann's belongings that were confiscated when he was jailed following his arrest.

The State alleged that Mathes, who was seventeen at the time of the crime, was a delinquent child. However, Mathes was waived into adult court, where the State charged him with Class C felony burglary and Class A misdemeanor resisting law enforcement. Before trial, the State dismissed the resisting law enforcement charge. On November 29, 2007, a jury found Mathes guilty of the burglary charge. Mathes later received permission to file this belated appeal.

**Analysis**

We are fully aware that when reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Id. When confronted with conflicting evidence, we must consider it in a light most favorable to the conviction. Id. We will affirm the conviction unless no reasonable fact-finder could have found the elements of the crime proven beyond a reasonable doubt. Id. Although this standard of review is highly deferential to the fact-finder, that deference is not absolute. Evidence of guilt of substantial and probative value, as required to affirm a conviction, requires more than a mere scintilla of evidence. Whitaker v. State, 778 N.E.2d 423, 425 (Ind. Ct. App. 2002), trans. denied. "Evidence that only tends to support a conclusion of guilt is insufficient to

sustain a conviction, as evidence must support the conclusion of guilt beyond a reasonable doubt." Id.

In order to convict Mathes of Class C felony burglary, the State was required to prove that he broke and entered the building or structure of another person, with intent to commit a felony in it. See Ind. Code § 35-43-2-1. Mathes does not deny that there is sufficient evidence he broke and entered Now Records' premises and that he could have been convicted of criminal trespass, if he had been charged with that offense. See I.C. § 35-43-2-2(a). He contends, however, that there is insufficient evidence of his intent to commit a felony.

Our supreme court has clarified the quantum of proof necessary to establish intent to commit a felony as an element of burglary. "[I]n order to sustain a burglary charge, the State must prove a specific fact that provides a solid basis to support a reasonable inference that the defendant had the specific intent to commit a felony." Freshwater v. State, 853 N.E.2d 941, 944 (Ind. 2006). The Freshwater court explicitly labeled as "incorrect" cases from this court suggesting that "[t]he intent to commit a felony can be inferred from the time, force, and manner of entry if there is no evidence that the entry was made with some lawful intent." Id. (quoting with disapproval Gray v. State, 797 N.E.2d 333, 336 (Ind. Ct. App. 2003) and Gentry v. State, 835 N.E.2d 569, 573 (Ind. Ct. App. 2005)). Thus, the mere fact that Mathes climbed over a fence and forcibly entered the Now Records warehouse late at night for no apparent lawful reason clearly is insufficient evidence of his intent to commit a felony therein.

Except for a cellphone, which later was determined to be in Rackemann's possession, nothing was missing from the Now Records warehouse. There is no evidence that the inside of the warehouse had been ransacked, as if Mathes and Rackemann were actively looking for things to steal. Although calling Rackemann Mathes's "accomplice," the State on appeal does not develop an argument that Rackemann's theft of the cellphone can be considered evidence, under an accomplice liability theory, of Mathes's intent to commit theft when he broke into the Now Records warehouse. See Appellee's Br. p. 9.

As for the Accord that someone at some time apparently had attempted to steal,[1] there is no evidence in the record tying either Mathes or Rackemann to that incident. The car had been parked there for three or four days, and all that was offered at trial was speculation by the Nahmiases that someone surely would have noticed if its window had been broken out sometime before the evening of March 15, 2007. Even so, approximately five hours had passed between the close of business on that day and when Mathes was discovered in the Now Records warehouse. The murky evidence regarding the Accord does not provide a solid basis for concluding that Mathes had the intent to commit theft when he entered the Now Records' premises.

**Conclusion**

There is insufficient evidence that Mathes had the intent to commit a felony when he broke and entered Now Records' premises. We reverse his conviction for burglary.

[1] Although two other vehicles in the parking lot had had their windows broken, there was no evidence that anyone had attempted to hotwire these vehicles.

Reversed.

BAILEY, J., and MATHIAS, J., concur.